



# CHAPTER V: THE ADJUDICATORY HEARING

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## **A. Introduction**

The adjudicatory hearing is a two-phase process. The first is the adjudication phase, in which the primary function of the court is to determine whether the child is within the jurisdiction of the CPA. In other words, whether the child is abandoned, abused, neglected, homeless, or lacks a stable home environment.<sup>1</sup>

The second phase is the disposition phase, in which the primary function of the court is to determine whether to place the child in the custody of the Idaho Department of Health and

<sup>1</sup> Idaho Code § 16-1619(3) and § 16-1603. In some cases, another child in the same home may come within the jurisdiction of the Act. Jurisdiction over other children in the home is discussed in Part F, below.

Welfare (IDHW, or the agency), or to place the child in the child's own home under the protective supervision of IDHW.<sup>2</sup>

There is a third determination that the court may make in the first phase of the adjudicatory hearing, which fundamentally affects the course of the proceedings and the future of the child and the family. The petition may allege that the parent(s) subjected the child to aggravated circumstances. If the court finds that the parent(s) subjected the child to aggravated circumstances, then the agency is not required to make reasonable efforts to reunify the family, and the agency instead proceeds with plans to identify and implement an alternative permanent placement for the child. The agency is required to proceed with the filing of a petition to terminate parental rights within 60 days of the finding of aggravated circumstances, unless there are compelling reasons why termination of parental rights is not in the best interests of the child.<sup>3</sup>

### **1. Phase 1: Adjudication**

The adjudicatory phase of the hearing is the trial.<sup>4</sup> This is the stage of the proceedings in which the court determines whether allegations of abandonment, abuse, neglect, homelessness, or lack of a stable home environment concerning a child are sustained by the evidence, and if so, whether the allegations are legally sufficient to support state intervention on behalf of the child. If the petition seeking court intervention on behalf of a child is sustained, the court may proceed to the disposition stage and determine who shall have responsibility for the child and under what conditions.

Adjudication provides the basis for state intervention into a family, while disposition concerns the nature of such intervention. The outcome of adjudication controls whether the state may intervene over the objections of the family. In all cases, the legal rights of interested parties are affected by the adjudication and interested parties are therefore entitled to notice as a matter of constitutional law.

The manner in which the adjudication is conducted also has important long-term implications for the child and the family. First, a speedy adjudication can reduce the length of time a child spends in out-of-home placement. Often it is necessary for the court to make a definitive decision whether or not a child has been abused or neglected before the agency and parents can begin to work together. The time in which this adjudication is completed may control the timing of later judicial proceedings.

A primary characteristic of the adjudication phase of the hearing is that formal legal process must be used to notify essential parties and witnesses of the hearing and to secure their attendance. At shelter care hearings, problems may arise because of short notice for obtaining

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<sup>2</sup> Idaho Code §16-1619(5). Prior to the 2001 revisions to the Child Protective Act, the disposition hearing was separate from the adjudicatory hearing, although the disposition hearing could be held immediately after the adjudicatory hearing if the parties agreed. The 2001 amendments combined the adjudicatory hearing and the disposition hearing into one hearing for two reasons. First, in most cases the information needed for disposition is available at the time of adjudication, and in most cases, the parties agreed to proceed with the disposition hearing at the time of the adjudicatory hearing. Secondly, combining the two hearings enable the process to comply with federal deadlines for reasonable efforts findings, described later in Part B, below.

<sup>3</sup> Idaho Code §§6-1619(6)(d), 16-1620 and 16-1624.

<sup>4</sup> The CPA also requires a pretrial conference, discussed later in this chapter in Part B.

representation for parents and guardians *ad litem* for children. This problem should be addressed at the shelter care hearing so that by the time an adjudicatory hearing is held, all necessary appointments are made. Case outcomes are improved when all interested parties receive timely notice of the adjudication. Parties include not only the parent allegedly committing the abuse or neglect, but also non-custodial parents, putative fathers, other persons with legal custody, long-term physical custodians, and in the case of Indian children, the child's Indian tribe.

When these parties are provided with early notice, they may make essential contributions to resolving the case, by (a) giving important information to the court, (b) providing a placement for the child, (c), paying child support, or (d) offering important emotional support for the child. When parties are not provided with notice prior to the adjudicatory hearing, this often prolongs a child's placement in foster care. For example, when a non-custodial parent or putative father is first notified only after efforts to work with the custodial parent are exhausted, new efforts must be initiated to work with the non-custodial parent or putative father, thus potentially prolonging the CPA case and the child's stay in foster care.

Locating missing parents may require inter- or intra-agency efforts. The portion of the agency that is responsible for child protection cases should be expected, and, if necessary, required to work with the portion of the agency that is responsible for child support enforcement, to obtain the assistance of the Parent Locator Service. IDHW or counsel for the state may need to work with correctional agencies to determine whether missing parents are in federal, state, or local custody, to provide notice, and to secure the parents' attendance (either in person or by telephone) at hearings. Efforts to identify, locate, and join essential parties should begin as early as possible in the process and if early efforts are not successful, should continue throughout the process.

Paternity issues must be resolved at an early point in the litigation. This should include prompt paternity testing, if necessary. It may be necessary to resolve paternity to determine such issues as whether the putative father should be admitted as a party to the litigation, whether an attorney should be appointed to represent him if he is indigent, and whether he should be considered as a candidate for custodian of the child.

The court must also resolve issues concerning a child's Indian heritage at an early point in the litigation. If the child is an Indian child, then the Indian Child Welfare Act applies and can substantially impact each stage of the child protection process, including the adjudicatory hearing.<sup>5</sup> The child's tribe is entitled to notice and opportunity to appear, and ICWA establishes certain preferences in the placement of the child.

An accurate trial record at the adjudication phase has importance beyond the adjudication itself. Adjudication should determine the precise nature of the abuse or neglect so that disposition, case work, and later court review can be focused on the specific facts which resulted in state intervention. Until the facts have been legally established at adjudication, IDHW may be unable to secure the cooperation of the parents who have denied that any problems exist. A clear record of the facts established at the adjudication may be useful in later court proceedings. This record

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<sup>5</sup> 25 U.S.C. § 1901 *et seq.* See Chapter XI of this Manual.

may foreclose later factual disputes or may provide important evidence which would otherwise be unavailable.

## **2. Phase 2: Disposition**

The second phase of the adjudicatory hearing is disposition. Disposition is the stage of the child protection process in which, after finding that the child is within the jurisdiction of the Child Protective Act, the court determines who shall have custody and control of the child. The court may set conditions concerning the child's placement and may issue specific directions to the parties.<sup>6</sup>

Court proceedings to determine disposition are a crucial part of the child protection process. At disposition, the court makes the decision whether to continue out-of-home placement or to remove a child from the home. A full examination of this issue is needed, including an examination of the agency's plan to protect the child from further harm, to prevent unnecessary out-of-home placement and to determine safe alternatives to placement. Based on this examination, the court can then evaluate whether these agency actions constitute reasonable efforts to prevent placement. Dispositional reports by the agency and the guardian *ad litem* that address these issues are needed to help the court and parties evaluate the necessity of removal.

When the court decides to place a child outside the home, additional steps are needed to minimize the harm of separation. The court should set terms for appropriate visitation and parent-child communication. The court may need to specify services needed to help the child deal with the trauma of separation and to deal with the child's other special needs. When the separation of siblings is unavoidable, visitation and communication between siblings must be addressed during disposition.

Decisions at disposition should help IDHW and parents develop an appropriate plan to address the specific problems which necessitated state intervention in the case. While adjudication should identify the problems justifying court involvement, disposition should make sure that the parties work out a plan to resolve them. The court should ensure that IDHW and the court do not work at cross-purposes.

Disposition should set a framework for review. Effective dispositional proceedings enable review proceedings to evaluate progress in the case. Where the family problems can be clearly described, appropriate services can be identified and appropriate objectives can be chosen, thus providing a clear focus for subsequent review hearings.

The precision with which the needed changes and remedial steps can be identified at disposition depends on the timing of the hearing and the nature of the family problems. If the family problems are not yet fully known, the case plan may need to set up further evaluation rather than to set concrete behavioral goals for parents. If family problems are already clear, it is appropriate for the court to state in some detail what the parties are expected to accomplish. Where the agency and parents have already worked out an initial case plan by the time of the

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<sup>6</sup> Idaho Code § 16-1619(5). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed in Part 5, below.

adjudicatory hearing, it may be desirable for the court to incorporate particular provisions of the plan into its written findings of fact, conclusions of law, and order.

### **3. Need for Distinct Disposition Phase at the Adjudicatory Hearing.**

Disposition issues should be considered separately from adjudication issues at the adjudicatory hearing. Whether the petition has been sustained (including both allegations of neglect or abuse and allegations of aggravated circumstances) and what is to happen next to the child, are two distinct determinations that need to be examined separately to accord full consideration to each. The two decisions are as distinct from one another as a finding of guilt is distinct from sentencing in a criminal case. It is important that they are not blurred.

When the adjudication and disposition functions are not separated, emphasis may fall on one at the expense of the other. Emphasis on dispositional issues at the expense of adjudication issues may result in the court asserting authority over the child and the family when the record and the findings do not support the exercise of that authority. Emphasis on adjudication issues at the expense of disposition issues may result in placement of the child without adequate consideration of all possible alternatives and which of those alternatives best meets the needs of the child.

Because the issues at the adjudication phase of the hearing directly affect substantive rights, these issues must be determined in proceedings that comply with the rules of civil procedure and the rules of evidence. Once the adjudication issues are determined, disposition issues may be resolved less formally. For example, agency reports and guardian *ad litem* reports are prepared for the disposition phase of the hearing and address issues of placement, visitation, and services. These reports typically contain hearsay information or information that does not comply with other rules of evidence. It is improper for the court to use these reports to determine whether the child is within the jurisdiction of the CPA, or whether aggravated circumstances exist, unless the parties stipulate to admission of the reports into evidence at the adjudication phase of the hearing.

### **B. Timing of the Adjudicatory Hearing and Pretrial Conference**

Principles of case management require that there be specific and strict time limits for every stage of the court process, including both the adjudication and disposition phases of the adjudicatory hearing. More importantly, because of the critical impact of child protection proceedings on the present and future quality of life of the child, it is essential that the case move forward expeditiously, toward a resolution that enables the child to safely and permanently return home or to an alternative permanent placement. Court enforcement of the time limits within which the adjudicatory hearing must take place compels court clerks, attorneys, investigators, and social workers to adjust to a quick pace of litigation.

Both state and federal law place deadlines on the timing of the adjudicatory hearing. State law establishes procedures designed to facilitate a timely adjudication, and federal law imposes severe consequences for failure to achieve a timely adjudication.

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.<sup>7</sup> The Child Protective Act requires that a pretrial conference be held within three to five

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<sup>7</sup> Idaho Code §16-1619(1).

days prior to the adjudicatory hearing.<sup>8</sup> The statute further provides for IDHW and the guardian *ad litem* to investigate and prepare written reports, which must be filed with the court prior to the pretrial conference.<sup>9</sup> The purpose of these requirements is to ensure the exchange of essential information, to promote knowing and voluntary settlement prior to trial, and to promote effective trial of issues to be determined by the court. The statute provides for the pretrial conference to be held outside the presence of the court, but the recommended best practice is for the judge to be available to accept stipulations or to resolve pretrial issues.

As part of the disposition phase of the adjudicatory hearing, the court must determine whether the agency made reasonable efforts to prevent the need for placement of the child in foster care. Federal law requires the court to make a *documented, case-specific* finding of reasonable efforts and requires that this finding be made within 60 days from the date the child was removed from the home. **If this finding is not made within the deadline, the child may lose eligibility for federal funds.** This omission cannot be corrected at a later date to reinstate the child's eligibility for funding.<sup>10</sup> It is therefore essential that the disposition phase of the adjudicatory hearing be held within 60 days from the date the child was removed from the home.

It is strongly recommended that the finding that IDHW made reasonable efforts to avoid out-of-home placement be made at the Shelter Care Hearing (*see* Chapter III.D.2 of this Manual). Regardless, the court should determine whether the finding has been made, and if not, should make the finding at Phase I of the Adjudicatory Hearing.

Due to the difficulty of scheduling hearings with numerous participants and within strict time limits, child protection cases must be given priority in scheduling and should be set for firm dates and times. The court should have a strong policy against continuances. Continuances should be granted only for compelling reasons and only for a short period of time. The continued hearing must be within the federal time limit if there is potential that the hearing will result in placement of the child in the custody of the agency. If a continuance is granted, the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

Generally, only a genuine personal emergency of a party or counsel warrants a continuance. In instances where there is an unavoidable delay in obtaining crucial witnesses or evidence, the court may proceed with the hearing to allow presentation of the available witnesses and evidence, adjourn the proceedings for a short period of time, and then reconvene as soon as possible to accept the remaining testimony or other evidence. Awaiting the outcome of criminal proceedings, even criminal proceedings related to the child protection case, is generally NOT a compelling reason to continue an adjudicatory hearing.

Although the court's decision at the adjudicatory hearing should help to identify family problems and needed remedial steps, there is no need to postpone disposition to identify all problems or all potential assistance and services. Many times the adjudicatory hearing will occur before

<sup>8</sup> Idaho Code §16-1619(2).

<sup>9</sup> Idaho Code §§ 16-1616, 16-1633(a), (b), 16-1619(2). For more information about submission of reports to the court, see Part E, below.

<sup>10</sup> 42 U.S.C. §671(a)(15); 45 C.F.R. §1356.21(b)(1).

significant case planning has taken place. Ongoing evaluation and work with the family will develop this further, and can be incorporated in the case plan to be reviewed by the court at the case planning hearing. Information about the case plan and the case planning hearing is included in Chapter VI.

### **C. Agreements by the Parties**

Most petitions are uncontested, i.e. are resolved by agreement of the parties. Therefore, court practices and procedures for uncontested or stipulated cases are particularly important. Parties should be able to stipulate or consent to adjudication issues without addressing disposition issues. Likewise, they should be permitted to reach a simultaneous settlement of adjudication and disposition issues. Idaho Juvenile Rule 38 sets forth minimum standards for court endorsement of stipulations by the parties.

Rule 38 provides that “the court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interests of the child. Any order entered based on a stipulation must include any case-specific findings as required by the statute or these rules.”

Thus, before accepting a stipulation, the court should conduct sufficient inquiry on the record to ensure that the agreement has been carefully considered by all the parties, especially the parents and the guardian *ad litem*, and that the parties are entering into the agreement knowingly and voluntarily. The court should determine that the parties have thoroughly considered the reports by the agency and the guardian *ad litem*, that the parties understand the content and consequences of the stipulation, and that the parties have had sufficient opportunity to confer with their attorneys.

The court should also conduct sufficient inquiry, on the record, to ensure that the stipulation is reasonable and appropriate. There are limits to a judge’s role in overseeing settlement agreements, due to the court’s mandated impartiality and lack of independent knowledge of the facts of a case. Nonetheless, many inappropriate stipulations can be eliminated through careful judicial scrutiny.

The court should ensure that the stipulation is comprehensive and that it addresses all of the key decisions the court must or should make at the adjudicatory hearing. The court should resolve any issues not addressed by the stipulation. The key decisions that the court must make at the adjudicatory hearing, including both adjudication and disposition issues, are described in Part F, below.

With respect to the adjudication phase, it is essential that the court’s findings accurately record the reasons for state intervention. Adjudicatory findings are the basis for the case plan, and the benchmark for reviews of case progress. They are a critical point of reference when the court must later decide whether a child can safely return home. The accuracy of adjudicatory findings should not be bargained away, and judges should discourage this practice.

If the disposition is to place the child in the custody of the agency, the issue of “reasonable efforts” must be addressed. Federal law requires a documented, case-specific finding that the agency made reasonable efforts to prevent or eliminate the need for placement of the child.<sup>11</sup> If this finding is not made, the child may lose eligibility for federal funding. The omission cannot be corrected later to reinstate the child’s eligibility. If the finding is made verbally on the record but is not documented, it can later be documented through a transcript of the hearing. The findings can incorporate by reference a written affidavit or report that describes the circumstances of the case and the efforts made in light of those circumstances. The only exception to the reasonable efforts requirement is in those cases where the court finds (based on hearing or stipulation) that the parent(s) subjected the child to aggravated circumstances.

★★★Even where the parties enter into a voluntary agreement for care, a **case-specific, documented finding of reasonable efforts to avoid removal** is **required** in order to preserve the child’s eligibility for federal IV-E finding. This finding is discussed in Chapter V.G.2.h.

Sometimes the parties will enter into a stipulation to dismiss the case. In such cases, the court should inquire, on the record, as to the basis for the stipulation. If the parties are in agreement that no abuse or neglect has occurred, or that the issues are sufficiently minor that they can be addressed informally, then dismissal may be appropriate. If the proposed dismissal is due to lack of evidence, then the court should inquire as to whether there has been adequate investigation.

#### D. Who Should Be Present

Generally, the same persons whose presence is required at the shelter care hearing are also essential to the adjudicatory hearing. Even if the adjudicatory hearing is uncontested, all parties who have been located and served should be present with their attorneys at the hearing. Their presence is needed to enable the court to ensure that the stipulation is appropriate and complete, that all parties knowingly and voluntary agree to it, and to schedule further proceedings.

##### 1. Judge

The judge who conducts the adjudicatory hearing should be the assigned judge for the duration of the case. Ideally, because adjudicatory issues are often resolved at shelter care, the same judge should preside over all stages of the child protection case, including the shelter care hearing. The involvement of one judge creates consistency in the directions given to the family and to the agency, avoids rehashing old arguments, and allows the judge who presides over subsequent hearings to be thoroughly familiar with facts presented at previous hearings.

#### Persons Whose Presence are Required at the Adjudicatory Hearing:

- ◆ Judge
- ◆ Parents whose rights have not been terminated, including putative fathers
- ◆ Relatives with legal standing and other custodial adults
- ◆ The child’s tribal custodian, tribe and tribal attorney, if applicable
- ◆ Assigned caseworker
- ◆ County Prosecutor or Deputy Attorney General
- ◆ Attorney for parents (separate counsel if conflict warrants)
- ◆ Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- ◆ Court reporter or suitable technology, security personnel, and interpreter(s), if applicable

<sup>11</sup> 42 U.S.C. §671(a)(15); 45 C.F.R. 1356.21(b)(1).

### **2. Parents whose Rights have not been Terminated, Including Putative Fathers**

As previously discussed in Chapter IV, and in the introduction to this chapter, it is essential that efforts begin as early as possible to identify, locate, and serve notice on all parents whose rights have not been terminated, including adoptive parents, non-custodial parents, and putative fathers. Issues as to paternity should be resolved as early as possible, including prompt paternity testing, if necessary. Identification and joinder of all parents is essential for several reasons. First, it is essential to the protection of substantial individual rights that these persons have notice and opportunity to participate. Second, the sudden appearance of a missing party later in the process can cause substantial disruption, both to judicial proceedings and to the life of the child. Finally, the participation of these parties may prove essential to achieving the ultimate goal - a safe home and loving family for the child. Parents should be present for the adjudicatory hearing, even if the case is uncontested, to enable the court to ensure that they fully understand and approve the stipulation.

The judge should make sure that service of process is completed as soon as possible. The judge may need to review the efforts of agency and counsel and enter orders as to further efforts to identify, locate, and serve missing parents. Although Idaho law generally requires service of process by personal service, it also permits service by registered mail and/or publication where personal service is impracticable.<sup>12</sup> Where personal service is impracticable, the county prosecutor or deputy attorney general responsible for the case should seek court approval of service by registered mail and publication well before the adjudicatory hearing, so that service can be completed prior to the adjudicatory hearing. The request should be by written motion, supported by an affidavit that 1) describes the efforts made to identify, locate, and serve the missing party, 2) states the address where service by registered mail is most likely to achieve actual notice, 3) describes why that address is most likely to achieve actual notice, 4) states the newspaper of general circulation must likely to achieve actual notice, and 5) describes why that newspaper is most likely to achieve actual notice.

If parties appear in a timely manner after receiving notice, they should be permitted to be heard on all issues, including application for custody of the child and dismissal of the case. If parties fail to appear and the record shows that proper notice has been given, the adjudicatory hearing should proceed as scheduled, while efforts to identify, locate, and join parents should continue as part of the permanency planning process.<sup>13</sup>

### **3. Relatives with Legal Standing and Other Custodial Adults**

In many child protection cases, parents have left children in the homes of relatives or friends who have become full-time caretakers but who don't have legal custody. Full-time caretakers who don't have legal custody but who are functioning as parents should be present at the adjudicatory hearing. Their presence is needed because they may be essential witnesses regarding issues to be determined in the adjudication phase, and they may be essential resources in the disposition phase, as continuing caregivers for the child.

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<sup>12</sup> Idaho Code §16-1612. See Chapter III for more information about initiating a child protection case, including service of process.

<sup>13</sup> See Chapter VI regarding permanency planning.

Generally, in Idaho, the only relatives whose legal standing is clearly acknowledged are parents whose rights have not been terminated (including adoptive parents) or another relative who has been appointed by the court as the child's guardian. Whether other relatives and step-parents have legal standing entitling them to party status or other levels of participation in a child protection case is a subject of considerable debate. In *Roe. v. Idaho Department of Health and Welfare*, 134 Idaho 760, 9 P. 3d 1226 (2000), the Idaho Supreme Court denied the request of a grandparent who sought to intervene in a child protection case (to seek placement of the child) even where the grandparent was providing foster care to the child at the time of the request.<sup>14</sup>

#### **4. Indian Custodian, the Child's Tribe and Attorney, if Applicable**

It is very important that efforts be made as early as possible to determine if the child is an Indian child. For purposes of the Indian Child Welfare Act, a child is an Indian child if the child is a member or is eligible for membership in an Indian tribe.<sup>15</sup> If there is a question as to whether the child is a member or is eligible for membership in a particular Indian tribe, it may be necessary to request a determination of that issue from the Indian tribe.<sup>16</sup> If the child is an Indian child, the child's Indian tribe is entitled to notice and an opportunity to appear.<sup>17</sup> In some cases, the proceedings must be transferred to the tribal court for resolution.<sup>18</sup> ICWA also establishes preferences for placement of Indian children.<sup>19</sup>

Identification of Indian children and joinder of the child's Indian tribe is important beyond just issues of compliance with federal law. Compliance with ICWA is important to protect the unique and substantial interest of the tribe and the Indian child, and because the tribe often has information regarding the child and the family that is critical to assisting the court in good-decision making regarding the child. In addition, the sudden appearance of a tribal claim at a later point in the process can cause major disruption to the judicial proceedings and, more importantly, to the life of the child. Such disruption can be avoided by early and diligent efforts to determine whether the child is an Indian child and to provide notice to the child's tribe.

#### **5. Assigned Caseworker**

To provide the court with complete, accurate, and up-to-date information for the hearing, and to engage in meaningful settlement efforts, the caseworker with primary responsibility for the case must be present, both for the adjudicatory hearing and the pretrial conference. The presence of other agency staff may also be necessary if they are witnesses regarding issues to be determined in the adjudication phase of the adjudicatory hearing.

<sup>14</sup> See also *Troxell v. Granville*, 530 U.S. 57 (2000); *Stockwell v. Stockwell*, 116 Idaho 297, 775 P.2d 611 (1989); *In re Copenhaver*, 124 Idaho 888, 865 P.2d 979 (1993); *Leavitt v. Leavitt*, 132 P. 3d 421(2006). See also Idaho Code § §32-717(3) and 32-719.

<sup>15</sup> 25 U.S.C. §1903(4).

<sup>16</sup> For a thorough discussion of ICWA, see Chapter XI of this manual. Each Indian tribe establishes the requirements that must be met to be a member of that tribe. The tribe's determination of membership is final and is entitled to full faith and credit under §1911(d) of ICWA and federal case law. See e.g. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); see also *Indian Tribe v. Doe*, 123 Idaho 464, 849 P.2d 925 (1993) and *Doe v. Doe*, 127 Idaho 452, 902 P.2d 477 (1995), for Idaho decisions applying ICWA.

<sup>17</sup> 25 U.S.C. §1912.

<sup>18</sup> 25 U.S.C. §1911.

<sup>19</sup> See Chapter XI and Chapter VI, part 1, for further information about placement of Indian children pursuant to ICWA.

### **6. County Prosecutor or Deputy Attorney General**

In child protection cases in Idaho, the state is represented by the county prosecutor or a deputy attorney general.<sup>20</sup> It is important that the attorney representing the state be sufficiently knowledgeable and experienced in trial practice generally and in child protection specifically, not only to ensure quality representation of the state's interest, but also to provide leadership in the investigation, prosecution, and resolution of child protection cases. The same attorney should represent the state throughout the case, to ensure consistent, goal-oriented representation of the state's interest in the case.

The attorney for the state must make continuing efforts to create and maintain an active partnership with the local agency caseworkers and local law enforcement officers. The attorney must rely on caseworkers and involved law enforcement officers to gather information and prepare recommendations to be presented to the court. Caseworkers and law enforcement officers must rely on the attorney to ensure that the information is admitted into evidence by the court and is legally sufficient to support the recommended action.

### **7. Attorney for Parents (Separate Attorneys if Conflict Warrants)**

As discussed in Chapter IV (Shelter Care), it is essential that parents have meaningful representation at all stages of a child protection case. Appointment of counsel for parents who are indigent should have been made prior to or at the shelter care hearing. This includes appointment of separate counsel if one attorney would have a conflict of interest representing both parents. In some cases, the conflict will be apparent from the outset, and separate counsel can be appointed from the outset. In other cases, the conflict should be apparent prior to or at the pretrial conference. An attorney representing both parents should be alert to the potential for a conflict of interest in the representation of both parents and should promptly notify the court of any conflict warranting his or her withdrawal as attorney for one of the parents. This will enable the court to promptly appoint substitute counsel, minimizing delay of the progress of the case.

### **8. Guardian *ad litem*, Attorney for Guardian *ad litem*, and/or Attorney for Child**

As discussed in Chapter IV (Shelter Care), it is essential that the child's interests be independently represented in child protection cases, either through a guardian *ad litem* and counsel for the guardian *ad litem*, and/or through counsel for the child. Appointment of the guardian *ad litem*, the attorney for the guardian *ad litem*, and/or an attorney for the child should have been made prior to or at the shelter care hearing. The guardian *ad litem* is entitled to full participation in the proceedings and has specific authority to investigate the circumstances of the case and to monitor the progress of the case.<sup>21</sup>

In some cases, conflict may arise between the guardian *ad litem* and an older child as to what is in the best interests of the child. In these cases, it may be appropriate to appoint separate counsel for the child to ensure that the child's views are meaningfully presented to the court. Other Idaho laws recognize that older children should have a voice in judicial determinations regarding the selection of their custodians.<sup>22</sup> Because determinations of custody and best interests are

<sup>20</sup> See Idaho Code §16-1605.

<sup>21</sup> Idaho Code §16-1933.

<sup>22</sup> See e.g. Idaho Code §§ 15-5-203, 15-5-206, and 15-5-207, regarding guardianship of minors; §§ 32-704(4) and 32-717(2), regarding custody of children in divorce cases.

dispositional issues, a conflict warranting appointment of separate counsel for the child should not delay the adjudication phase of the adjudicatory hearing.

### **9. Court Reporter or Suitable Technology, Security Personnel, and Interpreter(s), if Applicable**

As discussed in Chapter IV (Shelter Care), these requirements apply to each proceeding in a child protection case. Court reporters or other suitable technology are necessary to ensure that an accurate record is made of child protection proceedings. Security personnel must be immediately available whenever needed to ensure the safety of all participants. Interpreters must also be available for non-English speaking parties and witnesses.

### **E. Persons whose Presence may also be Needed**

If the adjudicatory hearing is contested, additional witnesses deemed necessary by the parties must be present. Although each party, through counsel, is responsible for securing the attendance of its witnesses, the court's role in ensuring the presence of witnesses can be vital. The court may need to inquire as to efforts to identify and locate witnesses, and it may issue subpoenas and other appropriate orders.

#### **Persons whose presence may also be needed:**

- ◆ Age-appropriate children
- ◆ Extended family members
- ◆ Judicial case management staff
- ◆ Law enforcement officers
- ◆ Service providers
- ◆ Adult or juvenile probation or parole officers
- ◆ Other witnesses

Witnesses required for the adjudication phase may differ from those required for the disposition phase. Because the primary issue at the adjudication phase is whether the child is abused, neglected, or otherwise within the jurisdiction of the Act, the key witnesses will be those who have knowledge of the circumstances giving rise to the petition, such as law enforcement officers involved in the removal of the child, doctors who have examined the child's injuries or diagnosed the child's physical or developmental condition, or other witnesses to incidents of abuse, neglect, or abandonment. Because the primary issues at disposition are the placement that is in the child's best interests, and whether the agency made reasonable efforts to avoid placement, key witnesses may include friends, family members, or service providers, who have been or may be called upon to provide resources for the child and/or the parents.

Careful consideration should be given to whether the child should be present for the adjudicatory hearing. The considerations as to the child's presence are different at the adjudication and disposition phases.

In the adjudication phase of a contested adjudicatory hearing, the proceeding is more formal and the key issue is whether the child is abused, neglected, or otherwise comes within the jurisdiction of the Act. Generally, the child should not be present for this portion of the hearing, due to the potential trauma to the child from the testimony and other aspects of such a hearing. Every effort should be made to make the child's testimony unnecessary, but if the child's testimony is necessary, alternatives to in-court testimony should be pursued to minimize the trauma to the child.

The disposition phase is less formal, and the primary issue is what placement is in the child's best interests. It may be both appropriate and desirable for older children to be present at this stage, both from the court's perspective and the child's perspective. Age-appropriate children can provide the court with information as to their perception of their needs, interests, and concerns, and the opportunity to see and hear the child can be of great value to the judge. Older children may have questions that can be answered at the disposition phase, and the opportunity to participate may allow a child a greater sense of self-determination.

### **F. Submission of Reports to the Court**

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, prepare a written report, and file the report with the court prior to the pretrial conference.<sup>23</sup>

Idaho law further provides for the guardian *ad litem* to conduct an independent investigation of the circumstances of the child, to prepare a written report, and to file the report with the court at least five days prior to the adjudicatory hearing.<sup>24</sup> As noted in Chapter IV (Shelter Care), the recommended best practice is to appoint a guardian *ad litem* for a child in every child protection case. A further recommended best practice is to include language in the court's shelter care order requiring the preparation of the report and the filing of the report prior to the pretrial conference.

The primary purpose of the reports is to address issues at the disposition phase of the adjudicatory hearing. The reports are a valuable tool in the disposition phase of the case for several reasons. The process of report preparation can tighten a caseworker's or guardian's analysis of the case. The information in the reports can assist the parties and counsel in their analysis and enable them to more effectively contribute to a successful resolution of disposition issues. Additionally, once a child has been determined in the adjudicatory phase to be within the jurisdiction of the CPA, the information can be of invaluable assistance to the court in determining disposition issues when disposition is contested or in determining whether to approve a stipulated disposition.

The reports are NOT admissible by the court for purposes of determining issues at Phase I of the adjudicatory hearing<sup>25</sup> – whether the child is within the jurisdiction of the CPA or whether the parent(s) subjected the child to aggravated circumstances – because the reports typically contain hearsay information or other information that does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes prior to disposition. As noted above, the process of report preparation can tighten a caseworker's or guardian's analysis of the case. Also, the reports often serve as the primary discovery mechanism in child protection cases, ensuring that essential information is distributed to all parties prior to the adjudicatory hearing, working as an alternative to the more time-consuming methods of discovery used in other civil

<sup>23</sup> Idaho Code §16-1616. Although the preparation of such reports is routine, prior to 2005 they were not required by the Child Protective Act. The 2005 amendments to the CPA clarify that the preparation of a report is mandatory.

<sup>24</sup> Idaho Code §16-1633.

<sup>25</sup> Idaho Code §16-1616(3).

proceedings.<sup>26</sup> The availability of this information prior to the pretrial conference promotes reasonable and informed settlement of cases prior to trial. Finally, when a stipulation is reached, the parties may stipulate to admission of all or portions of the reports, which then can be used as the basis for the court's written findings and conclusions.

The agency is required to investigate the circumstances of the child and the child's family, and the report is required to include a social evaluation of the child and the parents, or other legal custodian, and such other information as the court shall require.<sup>27</sup> The guardian *ad litem* is required to conduct an independent investigation of the circumstances of the child, including the circumstances described in the petition, but the statute does not specify the contents of the guardian *ad litem*'s report. The statute provides that the guardian *ad litem* shall have such other duties as the court may require, which would include further investigation or report preparation.<sup>28</sup>

The reports should be as thorough and comprehensive as possible. They should include all relevant information available to IDHW or the guardian *ad litem* concerning all the issues to be determined by the court at the adjudicatory hearing. This includes issues to be determined at Phase I of the adjudicatory hearing, even though the report is not admissible by the court to determine the adjudication issues in a contested proceeding. Information relevant to the adjudication issues is important because this information promotes reasonable and informed settlement, and because information as to adjudication issues provides the framework for determination of the disposition issues. As previously discussed in the introduction of this section, specific findings as to the nature of the harm that brings the child within the jurisdiction of the statute is a necessary prerequisite to determining the actions necessary to prevent that harm or to protect the child from further harm in the future.

Agencies and organizations who provide guardians *ad litem* for child protection cases should develop report forms to expedite report preparation. The forms should be precisely worded to address the exact issues to be determined by the court. This promotes a thorough analysis of each of the key issues by the caseworker or guardian who is preparing the report. It also allows the judge, when appropriate, to incorporate the reports by reference in the court's written findings and conclusions.

### **G. Evidentiary Issues at the Adjudicatory Hearing**

The standard of proof at Phase I of the Adjudicatory Hearing is preponderance of the evidence.<sup>29</sup> The Idaho Rules of Evidence apply to Phase I of the hearing.<sup>30</sup> Because they contain hearsay, the reports of IDHW and the guardian *ad litem* may not be considered during Phase I of the Adjudicatory Hearing.<sup>31</sup>

<sup>26</sup> Neither the CPA nor the Idaho Juvenile Rules prohibit the use, in CPA cases, of the formal methods of discovery available in civil cases generally. However, the use of formal discovery by the state against the parents may in some instances raise constitutional issues regarding the parent's rights against self-incrimination. *See* Id. R. Crim. Pro. 26-37.

<sup>27</sup> Idaho Code §16-1616(1), (2).

<sup>28</sup> Idaho Code 16-1633.

<sup>29</sup> Idaho Code § 16-1619(4).

<sup>30</sup> Id R. Evid.101; I.J.R. 51.

<sup>31</sup> Idaho Code § 16-1616(3).

In Phase II of the Adjudicatory Hearing, the court may consider any information relevant to its decision regarding the child's disposition including the reports of the guardian *ad litem* and of IDHW.<sup>32</sup>

Attempts to present hearsay evidence at Phase I of the adjudicatory hearing can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, agency caseworkers or law enforcement officers may rely on a doctor's written report of a medical diagnosis in concluding that a child is abused or neglected. At the adjudicatory hearing, however, the rules of evidence apply, including rules regarding the admissibility of hearsay evidence.<sup>33</sup> To continue the example, the doctor's testimony will be necessary at the adjudicatory hearing. The caseworker cannot testify as to the doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit the doctor's written report. Caseworkers and law enforcement officers are surprised and frustrated by the exclusion of such testimony, and attorneys representing the state's interests are frustrated and embarrassed by the dismissals that result when the excluded testimony is essential to the case. Regular communication and active cooperation between counsel for the state, agency caseworkers, and involved law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

## **H. Key Decisions the Court Should Make at the Adjudicatory Hearing**

### **1. State Law Requirements**

#### **a. Phase 1: Adjudication**

##### **i. Is the child within the jurisdiction of the Child Protective Act?**

The first issue the court must determine is whether the child is within the jurisdiction of the Child Protective Act. The burden of proof is on the state, and the standard of proof is by a preponderance of the evidence. Idaho law requires the court to make a finding on the record of the facts and conclusions of law which bring the child within the jurisdiction of the CPA.<sup>34</sup> Some confusion results from the use of the word "jurisdiction" in the Idaho statute. A child is within the jurisdiction of the court if the child lives or is found within the state. The child is within the jurisdiction of the Act if the court determines that one of the five bases for jurisdiction exists (abuse, abandonment, neglect, etc.). If the child is within the jurisdiction of the court, then the court has authority to determine if the child comes within the jurisdiction of the Act. If the child is within the jurisdiction of the Act, then the court has the authority to exercise the powers set forth in the act. There are five bases for a child to be within the jurisdiction of the Act.

##### **◆ Abandoned**

Idaho law defines abandoned as "the failure of a parent to maintain a normal parental relationship with his child including, but not limited to, reasonable support or regular personal

<sup>32</sup> Idaho Code § 16-1616(4); 16-1619(5); 16-1633(2).

<sup>33</sup> Id. R. Evid. 101.

<sup>34</sup> Idaho Code §16-1619(4).

contact.” The statute further provides that failure to maintain this relationship for one year is prima facie evidence of abandonment.<sup>35</sup>

◆ Abused

Idaho law defines “abused” as any case in which a child has been the victim of:

(a) conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of

such condition or death, or the circumstances indicate that such condition or death may not be the product of accidental occurrence, or (b) sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child’s health or welfare or mental injury to the child.<sup>36</sup>

**Key state law decisions to be made at Phase 1 of the adjudicatory hearing:**

- ◆ Is the child within the jurisdiction of the Child Protective Act because the child has been abandoned, abused, neglected, is homeless or lacks a stable home environment or because the child is a sibling or a child who has been abandoned, abused, or neglected?
- ◆ Has the parent subjected the child to aggravated circumstances?

◆ Neglected

Idaho law defines “neglected” as a child:

(a) who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them.... or (b) whose parents are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.<sup>37</sup>

Idaho law specifically provides that a child will not be deemed neglected solely because a child’s parent or guardian chooses spiritual treatment for a child instead of medical treatment, but there is statutory authority for the court to order emergency medical treatment for a child, whether or not the child is within the jurisdiction of the Act.<sup>38</sup>

◆ Homeless

The CPA does not define “homeless.” The purpose of this provision is to address two types of situations. The first is where a child has come into contact with authorities and is apparently homeless, because no parent or other custodial adult can be located, and the child needs a home while authorities investigate the situation. Typically the child is a runaway or a juvenile whose parents refuse to allow the child home, sometimes after the juvenile’s release from incarceration.

<sup>35</sup> Idaho Code §16-1603(1)(a), §16-1602(2).

<sup>36</sup> Idaho Code §16-1603(1)(b), §16-1602(1).

<sup>37</sup> Idaho Code §16-1603(1)(b), §16-1602(21).

<sup>38</sup> Idaho Code §16-1602(21), §16-1616.

The second is where a family is homeless, and therefore the children are homeless. The purpose of including homelessness in the CPA is not to impose further displacement on an already displaced family. The purpose is to establish a statutory basis to provide services and shelter to the children when the parents are unable or unwilling to do so. In such cases, the reasonable efforts of the agency to provide housing or employment assistance, and the parent's ability and willingness to participate in those services, becomes an issue in the adjudication phase, as well as in the disposition phase. If the parents are not able to provide the child with a home despite agency assistance, or are unwilling to accept assistance that would enable the parent to provide the child a home, then such evidence supports a determination that the child comes within the jurisdiction of the act.

◆ Lacks stable home environment

The CPA does not define lack of a "stable home environment." This provision should not be interpreted to provide a basis for state intervention simply because the parent's lifestyle is outside the norm. Rather, it should be limited to those situations where the seriousness of the harm to the child is similar to that of the other bases for jurisdiction.

Often, the situations that fall in this category also fall into the category of neglect. But there are two types of situations that fall into this category that might not necessarily fit into the category of neglect. One is the "drug house" – where an occupant of the home is a distributor of illegal drugs, and the nature of the substances and people frequently in and through the house endangers the safety of the child or children in the home.

Another situation that might fall within this category is the violent home – where the children are not directly abused, but they regularly witness domestic violence. Like homelessness discussed above, the purpose of this provision is not to punish the adult victim of domestic violence by taking the child away, but rather, is to establish a statutory basis to provide services and shelter to the child when the parent is unable to do so. Like homelessness discussed above, the reasonable efforts of the agency to provide assistance to the adult victim, and the adult victim's ability and willingness to participate in those services, becomes an issue in the adjudication phase, as well as in the disposition phase. If the parent who is the adult victim of domestic violence is not able to provide the child with a safe home despite agency assistance, or is unwilling to accept assistance that would enable the parent to provide the child a safe home, then such evidence supports a determination that the child comes within the jurisdiction of the Act. (The court can enter protective orders that expel the abusive parent from the home or that limit contact between the abusive parent and the non-abusive parent or the child, which is discussed in part F, below.)

◆ Other children in the home

An issue that frequently arises in child protection cases is what to do about other children in the home when one of the children is abandoned, abused, or neglected. If one child is abused, abandoned, or neglected, it cannot simply be presumed that the others are also. Neither, however, can it be assumed that the other children are safe. Idaho law provides that, if a court has taken jurisdiction of a child, it may take jurisdiction over another child, if the other child is

living or having custodial visitation in the same household, and if the other child has been exposed to or is at risk of being a victim of abuse, abandonment, or neglect.<sup>39</sup>

**ii. Has the parent subjected the child to aggravated circumstances?**

Generally, if aggravated circumstances is an issue, it will be alleged in the petition and determined at the adjudicatory hearing. The concept of aggravated circumstances was added to the law of child protection to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find a new family who will provide the child with a safe and loving home can be initiated promptly and so that the permanent placement of the child with that family can be implemented promptly.

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing, so aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.<sup>40</sup> However, a finding of aggravated circumstances will fundamentally alter the process of the case. Such allegations should be made at the earliest possible point in the case.

If aggravated circumstances are found, then:

- 1) the agency is not required to make reasonable efforts to reunify the family;<sup>41</sup>
- 2) the next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent placement for the child;<sup>42</sup> and
- 3) IDHW must file a petition to terminate parental rights unless the court finds compelling reasons why termination is not in the best interests of the child.<sup>43</sup>

If aggravated circumstances are not found, then the next step is the case plan hearing, the purpose of which is to determine a case plan that includes a reunification plan and an alternative permanent placement plan.<sup>44</sup> Because a finding of aggravated circumstances has such substantial consequences, it should be considered an adjudication issue, to be determined at a hearing where the rules of civil procedure and rules of evidence apply.

In determining whether the parent has subjected a child to aggravated circumstances, the statute specifically identifies the following: abandonment; torture; chronic abuse; committed murder or voluntary manslaughter; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter; committed a felony assault that results in serious bodily injury to any child of the parent; or the parental rights of the parent to a sibling have been terminated involuntarily.<sup>45</sup> The statute further provides that aggravated circumstances “include but are not limited to” those specifically listed. In determining whether other circumstances constitute aggravated circumstances, the court should be guided by two factors: whether the circumstances

<sup>39</sup> Idaho Code §16-1603(2). The other child must be named in the petition or amended petition, the parents or legal guardians must have notice, and the child must be living or found within the state.

<sup>40</sup> See Idaho Code §16-1610, §16-1619.

<sup>41</sup> Idaho Code §16-1619(6)(d) and 16-1620(1).

<sup>42</sup> Idaho Code § 16-1620(1).

<sup>43</sup> Idaho Code §§ 16-1610(6)(d), 16-1620, 16-1624. See Chapters VI and VII for further discussion of permanency planning, the permanency hearing, and compelling reasons.

<sup>44</sup> Idaho Code §16-1621; see Chapter VI for further discussion of the case plan and the case plan hearing.

<sup>45</sup> Idaho Code §16-1619(6)(d).

are similar in severity to those listed in the statute and whether the circumstances are such that no effort should be made to reunify the family.

## **b. Phase 2: Disposition**

### **i. Should the child be placed in the custody of the agency or in the child's own home under agency supervision?**

If the child is found to be within the jurisdiction of the CPA, then the child must be placed either in the custody of the agency or in the child's own home under protective supervision of the agency.<sup>46</sup> This is the primary decision to be made at the disposition phase of the adjudicatory hearing. The primary consideration in determining the disposition of the child is the child's best interests. Placement of the child at home under agency supervision is appropriate if the placement of the child in the home can be made subject to conditions that will ensure the health and safety of the child while in the home. Otherwise, placement of the child in the custody of the agency is necessary to ensure the health and safety of the child while reunification efforts are made. Where aggravated circumstances have been found, no effort is to be made at reunification, and the child must be placed in the custody of the agency.

A decree placing the child in the custody of the agency or in the child's own home under agency supervision continues until the child turns eighteen or until the court orders otherwise.<sup>47</sup> Prior to the child's eighteenth birthday, the case remains under the continuing supervision of the court until the child is either permanently and safely returned home and the court closes the case or until the child is permanently placed with a new family and the court closes the case.<sup>48</sup>

#### **Key State Law Decisions to be made at Phase 2 of the adjudicatory hearing (disposition):**

- ◆ Should the child be placed in the custody of the agency or in the child's own home under agency supervision?
- ◆ If the child is to be placed in the custody of the agency, why is it contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in custody of the agency?
- ◆ If the child is to be placed in the custody of the agency, is the agency's proposed placement the least disruptive environment for the child?
- ◆ If the child is to be placed in the custody of the agency, are orders needed for parental visitation, sibling visitation, or child support?
- ◆ If the child is to be placed in the child's own home under agency supervision, what conditions are needed to ensure the child's safety and welfare in the home?
- ◆ Is there a continuing danger to the child, and is it in the best interest of the child to enter a protective order? If so, what are the terms and conditions of the protective order?
- ◆ What services are the agency to provide to the child, the child's parents, or the foster parents, pending the next hearing? In what services will the parent(s) be required to participate?
- ◆ If the child is to be placed in the custody of the agency, did the agency make reasonable efforts to prevent or eliminate the need for placement of the child in the custody of the agency (foster parents)?

<sup>46</sup> Idaho Code §16-1619(5)(a)&(b).

<sup>47</sup> Idaho Code §16-1619(7).

<sup>48</sup> This is one of the major changes to the CPA enacted in 2001. Previously, a child was placed in the custody of the agency or in the child's own home for a period not to exceed one year, subject to renewal. Idaho Code §16-1610(b),(d) (2000). The purpose of the amendment was to address the "revolving door" phenomenon, in which a child came into custody, the order expired, the child returned home, the child was subjected to new incidents of abuse and neglect, and the child came back into custody.

**ii. If the child is to be placed in the custody of IDHW, why is it contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in the custody of the agency?**

If the child is to be placed in the custody of the agency, state law requires that the court make detailed written findings, based on facts in the record, that it would be contrary to the welfare of the child to remain in the home and in the best interests of the child to be placed in the custody of the agency.<sup>49</sup> This finding is similar to federal findings that must be made within sixty days of removing the child from the home. This Manual recommends that the required federal finding be made at the shelter care hearing.<sup>50</sup> It is further recommended that at Phase 2 of the adjudicatory hearing, the court verify that the necessary federal finding was made at the shelter care hearing. If the federal finding was not made at shelter care, the court should make the finding at Phase 2 of the adjudicatory hearing.<sup>51</sup>

**iii. If the child is to be placed in the custody of the agency, is the agency's proposed placement the least disruptive environment for the child?**

When a child is placed in the custody of the agency, Idaho law vests authority in the agency to determine the child's placement, subject to review by the court.<sup>52</sup> Idaho law requires IDHW to make a reasonable effort to place the child in the least disruptive environment to the child, and the agency may consider placement of the child with related persons.<sup>53</sup> More information about the factors to be considered in determining or reviewing the appropriateness of a child's foster care placement can be found in Chapter VI, part B.5.

Because the placement of the child is critical to the child's well-being, the court should make careful inquiry as to the agency's proposed placement for the child at the disposition phase of the adjudicatory hearing. Under both state and federal law, there are substantial questions as to the nature and extent of the court's review, and a detailed discussion of those questions is beyond the scope of this text. But as a beginning point, Idaho judges and practitioners must be familiar with the following specific provisions of Idaho and federal law and with the recent decision of the Idaho Supreme Court in *Roe v. State*, 134 Idaho 760, 9 P.3d 1226 (2000) ("*Roe 2000*").

In *Roe 2000*, a grandmother who had established a strong relationship with her granddaughter as a de facto parent sought to intervene in a child protection case to seek permanent placement of her granddaughter. The Idaho Supreme Court affirmed the trial court's decision denying intervention, holding that the denial of the right to intervene was an appropriate exercise of the trial court's discretion. The Court further held that Idaho Code §16-1623(k), which requires the agency to make reasonable efforts to place the child in the least disruptive environment, "does not provide for intervention by related persons who believe that placement in their home will cause the least disruption in the child's life."<sup>54</sup> The Court noted that the grandparent did have the right to be heard in any review or hearing with respect to the child, pursuant to 42 U.S.C. 675(5)(g) and IDAPA 16.06.01.424.03.d.i (July 1, 1999), so that, although she would not be

<sup>49</sup> Idaho Code §16-1619(6).

<sup>50</sup> See Chapter IV.

<sup>51</sup> See Part H.2 of this chapter.

<sup>52</sup> Idaho Code §16-1629(8).

<sup>53</sup> Idaho Code §16-1623(k).

<sup>54</sup> 134 Idaho at 765, 9 P. 3d at 1230.

entitled to full participation as a party, she would be allowed to express her concerns regarding the child's placement. In reaching its result, the Court further stated:

If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live. *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-1623(h), the CPA provides the court only limited authority to review the Department's placement decisions.<sup>55</sup>

The Court next noted the specific sections of the CPA which require the court to approve placement of the child outside the state, to approve the return of the child to the home from which it was removed, and to review the agency's periodic reports as to the progress of the case. The court then stated:

The court's role in CPA actions is therefore much more limited than in custody cases, in which the court must determine which custody arrangement will advance the best interest of the child. [Citations omitted.] Therefore, Roe's claim for permanent placement is inconsistent with the limited scope of CPA proceedings.<sup>56</sup>

Although the Court offered these statements as to what judicial review of the agency's placement decision is *not*, it did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. The Court did, however, note the case planning requirements of the CPA in a earlier part of the decision. Pursuant to the CPA, once a child is found to be within the jurisdiction of the statute, the agency is required to file a case plan, which includes a reunification plan and an alternative permanent placement plan for the child; the CPA court then conducts a planning hearing at which the court determines whether to accept, reject, or modify the plan.<sup>57</sup> In cases where aggravated circumstances are found, IDHW is required to file a permanency plan, which is the agency's plan for the permanent placement of the child.<sup>58</sup> Presumably, the court could require the agency to include the child's foster care placement in the case plan and reject a plan that includes an inappropriate placement. Judicial review of the IDHW's placement decision in this manner should comply with both the statute and recent case law. There is more information about the case plan and the permanency plan in Chapters VI and VII.

This leaves a major question as to the nature and extent of judicial review of the IDHW's placement decision at the adjudicatory hearing and leaves the trial courts and the parties facing a serious dilemma in cases where the placement of the child is a major issue that needs to be

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<sup>55</sup> *Id.* at 767, 9 P. 3d at 1233 (referring to pre-2005 numbering of the Child Protective Act).

<sup>56</sup> *Id.*

<sup>57</sup> At that time, the case planning provision of the CPA was found at Idaho Code §16-1610(c); the provision is now Idaho Code § 16-1621. *See also* IJR 44.

<sup>58</sup> At that time, the permanency planning provision of the CPA was found at Idaho Code §16-1610(b)(2)(iv); following the 2001 revisions, it is found at Idaho Code §16-1608(e)(4). *See also* IJR 40(d).

resolved. Nonetheless, the placement of the child is of such importance to the child's well-being that the existence of these questions should not discourage the court and the parties from careful inquiry as to the agency's proposed placement of the child at the adjudicatory hearing. To the extent there is a genuine issue as to the appropriateness of the proposed placement, the court and the parties should explore the options, both practical and procedural, for resolution of that issue. One option may include orders for further investigation of the proposed placement or other placement options, to be included in the court's order scheduling the planning or permanency hearing. Another option may be to consider methods of alternative dispute resolution, such as mediation.

Finally, federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.<sup>59</sup> It is unclear whether the child may lose eligibility for federal funds if the agency's placement is rejected as part of judicial review. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."<sup>60</sup>

**iv. If the child is to be placed in the custody of the agency, are orders needed for parental visitation, sibling visitation, or child support?**

It is important that the child have the opportunity for regular and meaningful contact with the parent to maintain the parent-child relationship while efforts at reunification proceed. It is equally important that visitation include appropriate terms and conditions to protect the child's safety, to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid undue disruption of the child's foster placement. All appropriate efforts should be made to keep sibling groups together. If, however, siblings must be separated, it is very important that the siblings have the opportunity to spend time with each other. Finally, parents who are able to pay should be expected to help cover the costs of foster care, although the court should take care to avoid financial burdens that interfere with family reunification.<sup>61</sup> The court should inquire as to how these issues will be dealt with pending the next hearing and enter include appropriate orders in its disposition decree.

**v. If the child is to be placed in the child's own home under agency supervision, what conditions are needed to ensure the child's safety and welfare in the home?**

If the child is to be placed in the child's own home under agency supervision, it is essential that the decree specifically identify the conditions that will ensure the child's health and welfare while in the home. The conditions may include services that the agency is to provide and in which the parents are required to participate. The conditions may include specific behavioral directives for the parents and specific means by which the agency will monitor compliance with those directives. For example, in neglect cases, emergency homemakers, day care, in-home babysitters, or intensive home-based services in which professionals spend long periods of time in the home can sharply reduce the potential harm to the child. If drug use or abuse is an issue, drug treatment and random drug testing may be appropriate.

<sup>59</sup> 45 C.F.R. §11356.71(d)(1).

<sup>60</sup> See question and answer no. 13 at [www.acf.dhhs.gov/programs/cb/laws/qsett1.htm](http://www.acf.dhhs.gov/programs/cb/laws/qsett1.htm)

<sup>61</sup> Idaho Code § 16-1628 expressly provides for the entry of support orders in CPA cases.

The decree should specifically order all parties to comply with the conditions and state the consequences for failure to comply. The consequences may include, for example, contempt sanctions, removal of the child from the home without prior hearing, or removal of the child from the home following motion and hearing.

**vi. Is there a continuing danger to the child and is it in the best interests of the child to enter a protective order? If so, under what terms and conditions?**

In cases where a child has been abused by only one parent, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order that ensures the safety of the child while in the custody of the non-abusing parent. The protective order may expel the abusive parent from the home, restrain contact between the abusive parent and the child, and/or restrain contact between the abusive parent and the non-abusive parent.

Protective orders may also be appropriate where the child is placed in the custody of IDHW. When a parent has threatened or attempted to disrupt the child's foster care placement, or when the parent presents a credible threat to the foster family or to the child while with the foster family, it may be appropriate to enter protective orders restraining contact between the parent and the child or between the parent and the foster family.

**vii. What services are the agency to provide to the child, the child's parents, or the foster parents pending the next hearing? In what services will the parent(s) be required to participate?**

The next step in a child protection case is the case plan and the planning hearing, if aggravated circumstances are not found, or the permanency plan and the permanency hearing, if aggravated circumstances are found. One of the key elements of the case plan or the permanency plan is to identify the services the agency is to provide to the child and the foster family, to address the child's special needs, and to assist the child and the foster family in adjusting to the placement, ensuring the stability of the placement. A key element of the case plan is to identify the problems that need to be resolved before the child can be returned home, and to identify the tasks to be completed by the agency, the parents, or others to address each issue, including the services to be made available by the agency and in which the parent is to be required to participate. (There is more information in Chapters VI and VII regarding the case plan and the planning hearing and the permanency plan and the permanency hearing.)

By the time of the adjudicatory hearing, information regarding these issues will be available that will enable the parties to move forward with activities necessary for a successful resolution of the case. To the extent this information is known at the adjudicatory hearing, the court's disposition decree should specify the services to be provided to the child and the family, and the services in which the family is to be required to participate, pending the next hearing. The purpose is to keep the case moving forward, as there is often no good reason to wait for the case planning or permanency hearing when some information is already available that will enable the parties to start making progress on some of the issues.

For example, it may already be known that a parent has drug abuse issues. Thus one of the necessary steps will be a drug and alcohol evaluation to determine the nature and extent of the

problem and the treatment options available to address the problem. Or, it may already be known that the child has developmental problems or behavioral problems, so one of the necessary steps will be evaluations of the child to determine the nature and extent of the child's special needs and the options available to address those needs. The court's order can require that the evaluations be completed and the options identified prior to the next hearing and that the recommended or agreed upon option be included in the case plan or permanency plan.

Sometimes the determination of these issues by the parties can be the key to reaching an appropriate settlement at the adjudicatory hearing. If the agency has identified services it will provide to assist the family in resolving the problems that resulted in the child protection case, the parents may be willing to agree to adjudication and disposition issues to enable them to quickly access those services and to resolve the problems. If the parents demonstrate a commitment to participating in the services and resolving the problems, then requirements for the parents to participate in the services and to comply with specific behavioral directives may be conditions that would enable the child to safely remain at home under agency supervision.

**viii. If the child is to be placed in the custody of the agency, did the agency make reasonable efforts to prevent or eliminate the need for placement of the child in the custody of the agency (foster care)?**

If the child is to be placed in the custody of the agency, state law requires the court to make a series of reasonable efforts determinations. First, the court should determine whether the agency made reasonable efforts to prevent or eliminate the need to place the child in foster care.<sup>62</sup> Under state law, the reasonable efforts finding is not required if the court determines that the parent subjected the child to aggravated circumstances.<sup>63</sup> State law requires a case-specific written finding of reasonable efforts. This requirement can be met by incorporating by reference an agency report describing the efforts that were made and why those efforts were reasonable under the circumstances. In lieu of this finding, under state law, the court may find that reasonable efforts to prevent removal were not made because of immediate danger to the child.<sup>64</sup> Finally, state law requires the court to find that reasonable efforts to place the child with related persons were made but were not successful.<sup>65</sup>

**c. Other key state law decisions to be made at the adjudicatory hearing**

**i. Are further efforts needed to identify, locate, and serve essential parties?**

As repeatedly noted throughout this Manual, it is essential that the court actively monitor efforts to identify, locate, and serve all essential parties, including putative fathers and non-custodial parents. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree.

<sup>62</sup> Idaho Code §16-1619(6)(a); 42 U.S.C §671(a)(15); 45 C.F.R. §1356.21(b) through (d).

<sup>63</sup> Idaho Code §16-1619(6)(d).

<sup>64</sup> Idaho Code §16-1619(6)(b).

<sup>65</sup> Idaho Code §16-1610(6)(c).

**ii. Date and time for case planning or permanency hearing and whether any orders are needed to prepare for the next hearing.**

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory hearing. Because there are so many participants in child protection cases, and so many proceedings with strict deadlines, scheduling can be extremely difficult. These difficulties can be minimized by scheduling the next hearing on the record when all the participants are present with their calendars available. Also, if a party fails to appear, scheduling the next hearing on the record forecloses any potential excuse that the party did not have notice or did not know of the date and time for the hearing.

The next hearing to be scheduled depends on whether the court found aggravated circumstances. If aggravated circumstances are not found and the child is placed in the custody of IDHW, then IDHW must prepare a written case plan. The case plan must be filed with the court no later than 60 days from the date the child was removed from the home, or thirty days after the adjudicatory hearing, whichever occurs first. The planning hearing must be set for a date within five days of the filing of the case plan.<sup>66</sup> At the hearing, the court decides whether to approve, modify, or reject the plan. It is not clear whether the statute requires a case plan and a case plan hearing if the child is placed in the child's own home under agency supervision, but the recommended best practice is for the court to require it.<sup>67</sup>

If aggravated circumstances are found, then the court must hold a permanency hearing within 30 days after the court made the determination of aggravated circumstances. IDHW must prepare a written permanency plan and file and serve the plan at least five days before the permanency hearing. At the hearing, the court decides whether to approve, modify, or reject the plan.<sup>68</sup>

The guardian *ad litem* is not required to file a written report for the planning hearing or the permanency hearing. The guardian *ad litem* is, however, required to monitor the circumstances of the child and to perform such other duties as expressly required by court order.<sup>69</sup> The recommended best practice is to require the guardian *ad litem* to file a written report with the court prior to the hearing, with recommendations regarding the key decisions to be made by the court at the hearing and the information upon which those recommendations are based.

When the court schedules the next hearing, it should also enter any orders needed for the next hearing. This should include an order requiring the filing of the agency's plan and the guardian's report and the deadlines for filing them. Transport orders may also be needed if a parent is in jail or prison or the child is in detention or the custody of juvenile corrections. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to be appear by telephone.

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<sup>66</sup> Idaho Code §16-1621.

<sup>67</sup> Idaho Code §16-1621, IJR 44. There is more information about the case plan and the planning hearing in Chapter VI.

<sup>68</sup> Idaho Code §16-1620; I.R.J. 44. There is more information about permanency planning and the permanency hearings in Chapters VI and VII.

<sup>69</sup> Idaho Code §16-1633(3),(8).

Idaho law specifically provides that foster parents are entitled to notice of the planning hearing but are not parties to the child protection case.<sup>70</sup> If the child is placed in the custody of the state, the court should ensure that notice is given to the foster parents (by the court, the agency, or the attorney representing the state's interests) of the date and time for the planning hearing.

## 2. Federal Law Requirements

### a. **Is the child an Indian child? Are further efforts needed to determine if the child is an Indian child? If the child is an Indian child, has notice been given as required by ICWA? Are further efforts needed to comply with the notice requirements of ICWA?**

As repeatedly noted throughout this Manual, it is essential that the court actively monitor the case to ensure compliance with the Indian Child Welfare Act, both for the sake of the child and for the progress of the proceedings.<sup>71</sup> Chapter XI of the Manual contains a detailed discussion of the Indian Child Welfare Act. At the adjudicatory hearing, the court should make specific findings as to whether the child is an Indian child or whether further efforts are needed to determine if the child is an Indian child. If the child is an Indian child, the court should make specific findings as to whether notice has been given as required by ICWA, and whether further efforts are needed to comply with the notice requirements of ICWA. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree.

### b. **Adoption and Safe Families Act requirements**

#### i. **Best interests/contrary to the welfare decision**

If the court's decree at the adjudicatory hearing is the first court order sanctioning removal of the child from the home, federal law requires that the court document in its order a case-specific finding that is it contrary to the welfare of the child to remain in the home. If this finding is not made, the child will not be eligible for federal funds, and the omission cannot be corrected at a later date to make the child eligible. The finding cannot be a mere recitation of the language of the statute, but it can incorporate by reference an agency or guardian *ad litem* report that describes the specific circumstances making removal of the child in the child's best interests. If the court makes the finding on the record but fails to document the finding in the order, the omission can be corrected with a transcript of the hearing that documents the case-specific best interests/contrary to the welfare finding.

★★★If the order at the adjudicatory hearing is the *first order sanctioning removal of the child from the home*, a **case-specific, documented** finding of **contrary to the welfare/best interests** is **required** to preserve the child's eligibility for federal IV-E funding.

#### ii. **Reasonable efforts finding**

If the child is to be placed in the custody of the agency, federal law requires the court to determine if IDHW made reasonable efforts to prevent or eliminate the need to place the child in foster care.<sup>72</sup> Under federal law, the reasonable efforts finding is not required if the court determines that the parent subjected the child to aggravated circumstances. Federal law requires

<sup>70</sup> Idaho Code §16-1621(2).

<sup>71</sup> 25 U.S.C. §1901 *et seq.*

<sup>72</sup> 42 U.S.C §671(a)(15); 45 C.F.R. §1356.21(b) through (d).

a case-specific, written finding of reasonable efforts. This requirement can be met by incorporating by reference an agency report describing the efforts that were made and why those efforts were reasonable under the circumstances.

Federal law requires that the documented, case-specific finding be made within 60 days of the date the child is removed from the home. If the finding is not made within the deadline, the child may lose eligibility for federal funding. The omission cannot be corrected at a later date to reinstate the child's eligibility. If the finding is made on the record, but is not documented in the order, it can be later be corrected by preparation of a transcript.

★★★Federal law **requires** that the court find that IDHW made **reasonable efforts to avoid removal within the first 60 days after removal** occurs. Failure to make this finding will **jeopardize** the child's eligibility for federal **IV-E funding**.

This Manual has recommended that this reasonable efforts finding be made either when an order to remove the child is placed on the summons<sup>73</sup> or at the shelter care hearing.<sup>74</sup> Nonetheless, assuming the Adjudicatory Hearing is held within 60 days of the child's removal from the home, it is likely to be the last opportunity for the court to correct the record if the reasonable efforts finding has been previously omitted. The court should review prior orders in the case carefully to avoid omitting this crucial finding.

### **I. The Court's Written Findings of Fact and Conclusions of Law at the Adjudicatory Hearing**

The court should make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or guardian *ad litem*. It is particularly important that the written findings, conclusions, order, and decree include the following:

- ◆ If any necessary parties were not present, a finding that proper notice was given.
- ◆ If the decree/orders are entered based on the stipulation of the parties, findings that the stipulation is reasonable and appropriate and that the parties entered into it knowingly and voluntarily.
- ◆ State Law Adjudication findings and conclusions:
  - If the child is found to be within the jurisdiction of the act, adjudication findings that accurately reflect the reasons for state intervention; and
  - If aggravated circumstances are found, adjudication findings that accurately reflect the nature of the aggravated circumstances.
- ◆ Federal Law Adjudication findings and conclusions:
  - The court should make findings as to the child's status as an Indian Child. If the child is an Indian child, the court should make a finding that the Indian Child's tribe and Indian custodian have received notice of the case. If the court has jurisdiction over the case, and if the case will not be transferred to tribal court, the court should make findings as to the facts that led to this result.

<sup>73</sup> See Chapter II.A.2.

<sup>74</sup> See Chapter IV.D.7.

- If the order is the first sanctioning removal of the child from the home, the court should make findings that removal is in the child's best interests and that it is contrary to the welfare of the child to remain in the home. This finding must be case-specific and documented. It may incorporate by reference an affidavit that describes the specific circumstances. Federal funding is contingent upon this finding.
- If the adjudicatory hearing is within 60 days of the child's removal, and if, after reviewing prior orders in the case, the court determines that this finding was not made when an order to remove the child was on summons or the shelter care hearing, the court must find that IDHW made reasonable efforts to prevent removal of the child from the home. This finding is not necessary if the parent subjected the child to aggravated circumstances. If this finding is required, it must be case-specific and documented. It may incorporate by reference an affidavit that describes the specific circumstances. Federal funding is contingent upon this finding.
- ◆ Disposition findings and conclusions:
  - Decree placing child in the custody of the agency or in the child's own home under agency supervision, until the child's eighteenth birthday (or until otherwise ordered by the court prior to the child's eighteenth birthday).
  - If child is placed in custody of agency, case-specific best interests and reasonable efforts findings.
  - If the child is to be placed in the custody of the agency, orders as to visitation and child support, where appropriate.
  - If the child is to be placed in the child's own home under agency supervision, the conditions needed to ensure the child's safety and welfare in the home.
  - Services the agency is to provide to the child, the child's parents, and the foster parents, and services in which the parent(s) will be required to participate.
- ◆ Protective order(s), including terms and conditions.
- ◆ An order scheduling the next hearing, and any orders necessary to prepare for the next hearing.

## **J. Conclusion**

For many reasons, a timely, careful, and complete adjudicatory hearing can benefit each child and family before the court.

- ◆ By resolving disputed issues of fact in a timely manner and by addressing all the allegations in the petition, the court avoids unnecessary delays that arise when the parents and the agency cannot agree on what problems need to be resolved for reunification to occur or for the child to remain safely at home.
- ◆ By making a timely decision as to whether the agency is able to prove its case, the court reduces the time that children may unnecessarily spend in foster care in those cases where the case is ultimately dismissed.
- ◆ By making a thorough and timely decision on disposition, the court protects the well-being of the child and expedites the case planning and/or permanency planning processes necessary for the successful resolution of the case, either through safe and permanent reunification of the family or alternative permanent placement of the child.

- ♦ By conducting a timely hearing, the court emphasizes by its example the importance of time in the lives of the children involved and the need to move the case towards successful completion as soon as practicable.